80-543

No. .....

Supreme Court, U. S.
FILED
OCT 1 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

STATE OF NEW YORK,

Petitioner,

v.

ARCHIE WILLIAM HOWARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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Questions Presented

1. Whether a police officer who has sufficient basis to make inquiry of, but not arrest, an individual on the street who is acting suspiciously, may pursue that individual if he runs away.

2. Whether an individual, pursued by the police, who throws a vanity case into a pile of junk in the corner of a basement in a building and then attempts to get out of the basement through a locked door and a small window on the far side of the room has abandoned the vanity case.

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STATE OF NEW YORK,

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ARCHIE WILLIAM HOWARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

The petitioner State of New York respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeals entered in this proceeding on July 3, 1980.

Opinions Below

The opinion of the New York Court of Appeals, reported at 50 N.Y.2d 583, appears as appendix "A" hereto. The two prior opinions of the Appellate Division, First Department, of the Supreme Court of the State of New York, reported at 72 A.D.2d 503 and 65 A.D.2d 714, appear in Appendix "B" and Appendix "C", respectively.

Jurisdiction

The judgment of the New York Court of Appeals was entered on July 3, 1980. This petition for certiorari was filed within 90 days* of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

United States Constitution, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law, nor shall

* Petitioner understands that by a recent change of this Court's rules this petition for certiorari should have been filed within 60 days of the entry of judgment. Unaware of this rule change, petitioner was relying on former rule 22(1). Petitioner, therefore, asks this Court to waive this rule and accept this petition taking into account the seriousness of the issues presented and the former rule which allowed such petitions to be filed within 90 days.

private property be taken for public use, without just compensation.

New York Criminal Procedure Law § 140.50 Temporary questioning of persons in public places; search for weapons:

1. In addition to the authority provided by this article for making an arrest without a warrant, a police officer may stop a person in a public place located within the geographical area of such officer's employment when he reasonably suspects that such person is committing, has committed, or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.

* * *

3. When upon stopping a person under circumstances prescribed in subdivisions one and two a police officer or court officer, as the case may be, reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

Statement of the Case*

"Indicted for criminal posession of a controlled substance in the first degree and criminal possession of a weapon in the third degree, defendant Howard moved to suppress the gun and drugs which formed the basis for the indictment. They had been taken from him by Officers Charles Hanley and Cornelius Brosnan, who on the day of the seizure were on anticrime patrol in The Bronx in plainclothes and in an unmarked automobile. At about 1 p.m., in broad daylight, on University Avenue in the vicinity of Father Zeiser Place (an area which had a high incidence of burglaries), the officers observed Howard crossing University Avenue diagonally in a southeasterly direction. Their curiosity was aroused by the fact that defendant was carrying what appeared to be a woman's vanity case. As they passed defendant, both officers saw him look over his shoulder in their direction, in a manner described by Officer Hanley as "furtive". Defendant looked in the direction of the car two or three more times until he reached the center of University Avenue. Then as Hanley pulled the car to the right side of the street, defendant reversed direction, walked to the west side of the street and proceeded south on the sidewalk.

The police car made a U-turn and once again the officers saw defendant look in their direction. As the car neared him, defendant's pace quickened. As the car came parallel with defendant, Officer Brosnan displayed his police shield and said, 'Police Officer. I would like to speak

*The quoted portion of the Statement is taken verbatim from the opinion of the New York Court of Appeals. 50 N.Y.2d 586-88.

to you.' Though looking directly at the officers, defendant ignored them and continued walking south. The police followed and at the next opening between parked cars, Brosnan repeated the same words, and began to get out of the car. Defendant, without saying anything, started to run, holding the vanity case to his chest like a football would be held. The officers pursued and were joined in the chase by Victor Dragaj, a college freshman. Defendant proceeded over an iron fence, through an alleyway and into the basement of a building, at which point, pursued by Dragaj, defendant threw the vanity case into a pile of junk in the corner and sought but was unable to escape through a door which was locked, or a small window on the far side of the room. Dragaj restrained defendant and was joined by Officer Brosnan, who asked defendant why he had tried to get away. About 25 seconds later they were joined by Officer Hanley, who identified himself as a policeman and asked about the vanity case or box. Dragaj pointed to it and Hanley retrieved it from the rubbish pile, which was beyond defendant's reach, and immediately opened it, revealing a .38 caliber revolver and heroin in glassine envelopes. Hanley then placed defendant under formal arrest.

Criminal Term granted defendant's motion to suppress, concluding that defendant's flight could not escalate suspicion to anything more, that even if defendant's flight made a stop and frisk permissible the officers went beyond the allowable scope of CPL 140.50 since defendant was no threat to the officers' safety and the vanity case was outside the grabbable area, and that there had been no abandonment. The Appellate Division reversed on both grounds, 'on the law and the facts' (65 A.D.2d 714). Since reversal

was not on the law alone, defendant's application for permission to appeal was dismissed (46 N.Y.2d 1080). Howard then pleaded guilty to criminal possession of a controlled substance and appealed as permitted by CPL 710.70 (subd 2)." The Appellate Division unanimously affirmed the conviction. 72 A.D.2d 503.

Leave to appeal to the New York Court of Appeals was granted by a judge of that court. 48 N.Y.2d 801. In a 4 to 3 decision, the Court of Appeals reversed the judgment of conviction, holding that a police officer "may not pursue, *absent probable cause to believe* that the individual has committed, is committing, or is about to commit a crime, seize or search the individual or his possessions, even though he ran away." 50 N.Y.2d at 586 (emphasis added).

Applying the stringent "probable cause" standard, the four-judge majority ruled that the pursuit was unlawful despite the fact that it had "no difficulty" in concluding that the officers' inquiry of the defendant was justified:

> In an area beset by a high burglary rate defendant was seen carrying a woman's vanity case by the officers, one of whom testified that it was not uncommon for a burglar to carry away loot in his victim's luggage. Considering those facts together with defendant's numerous glances at the officers' car, his change of direction and his quickened pace, we conclude that, though the carrying by a man of a woman's purse does not constitute probable cause (*People* v. *Davis,* 36 N.Y.2d 280, *cert. den.* 423 U.S. 876) and though defendant could, the car being unmarked and the officers in plainclothes, have acted evasively out of fear for his safety, the circumstances constituted a sufficient basis for the inquiry made, which of itself constituted no

> more than a minor inconvenience to defendant (*Davis* v. *Mississippi,* 394 U.S. 721, 727, n.6, and cases cited, *infra,* pp 7 and 8; see 3 La Fave, Search and Seizure, § 9.2).

50 N.Y.2d at 589-90.

The majority also ruled that there was no abandonment of property "when the individual, cornered by his pursuers in the basement of a building and while looking for a way out of the basement, drops or throws a package he was carrying into a pile of junk. . . ." 50 N.Y.2d at 586. Judge Meyer declared that the issue of abandonment is "essentially a question of constitutional law." 50 N.Y.2d at 593. His opinion for the majority concluded that "it cannot be found that defendant's act in dropping or throwing the case in the corner while seeking to open or break down the door and window in the basement was an act 'involving a calculated risk' rather than a spontaneous reaction to the necessity of evading his pursuers . . . or that he purposefully divested himself of possession of the vanity case." *Id.*

Three judges on the Court dissented in an opinion written by Associate Judge Matthew Jasen. The dissenters agreed that there was sufficient basis for the police to approach the defendant and question him and that an individual has an absolute right to refuse to answer such an inquiry. The dissenting opinion, however, disagreed with the rulings that the police could not pursue the defendant when he fled and that the defendant had not abandoned the vanity case. Judge Jasen characterized the first ruling as "absurd":

> Yet, faced with these facts of an incriminating nature, the majority today holds that the officers could

> do no more than follow defendant to observe him from a distance. Such a conclusion borders on the absurd. The officers had every right, if not the obligation, to pursue defendant in order to investigate this highly suspicious conduct. In my opinion, once defendant ran away, the officers' level of suspicion was elevated to one of probable cause, remembering that "[p]robable cause exists if the facts and circumstances known to the arresting officer warrant a prudent man in believing that [an] offense has been committed" by the person to be arrested. (*People* v. *Oden,* 36 N.Y.2d 382, 384; *Brinegar* v. *United States,* 338 U.S. 160, 175-176.)

50 N.Y.2d at 595.

As to the second ruling concerning the abandonment, the dissenters concluded that "there can be no doubt but that the defendant, by throwing the vanity case on the pile of junk in the corner of the basement, intended to rid himself of the case containing incriminating evidence." *Id.* at 596.

Reasons for Granting the Writ

The decision below raises substantial federal questions which should be settled by this Court.

The four-to-three decision of the New York Court of Appeals holds that the Fourth and Fifth Amendments to the United States Constitution prohibit the police from pursuing individuals who flee from legitimate police inquiry. The decision also precludes trial courts from finding that property has been abandoned, even though it has been thrown in a junkpile from which the defendant appears to be running away at the time he was apprehended by the police while attempting to effectuate his flight. These

rulings unduly restrict the police from carrying out their responsibilities, underestimate the probative value of flight as consciousness of guilt, and impose unreasonable constitutional standards for courts to find that property has been abandoned.

The Lawfulness of the Police Pursuit

That the police may not pursue a suspect whom they have attempted to lawfully stop, but who runs away, is an unreasonable and illogical burden to place on our police. As the three judges of the New York Court of Appeals who dissented in this case observed, this holding "serves merely to deal another serious and unjustifiable blow to effective law enforcement." 50 N.Y.2d at 594.

Indeed, the decision below seems to contradict language employed by this Court in *Sibron* v. *New York,* 392 U.S. 40, 66 (1968):

> [D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea,* and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.

Ironically, the majority opinion below relies, in part, on the *Sibron* decision for its ruling.

The essence of the decision below is that two experienced police officers, in the presence of a man carrying a woman's vanity in an area noted for burglaries, who looked furtively at them on six different occasions, who reversed directions and increased his walking speed upon their

approach, and who, in response to the single request, "I would like to speak to you," put both arms around the bag and fled, should not pursue the man. According to Judge Meyer, the police may only continue observation of the suspect if they do so "unobtrusively and do not limit defendant's freedom of movement by so doing." 50 N.Y.2d at 592. How can the police "unobtrusively" observe a man who flees through the streets and alleys and hurdles an iron fence? Inhibiting our police officers in such situations, as the dissent below noted, "borders on the absurd." 50 N.Y.2d at 595.

The rationale for the majority's conclusion is its determination to validate the right of an individual under the Fourth and Fifth Amendments to be free from detentions absent probable cause and to be able to remain silent in the face of police interrogation. Surely this Court should review this application of the Fourth and Fifth Amendments to the United States Constitution, particularly where, as here, the New York Court of Appeals ostensibly relies on several of this Court's decisions for its ruling. *United States* v. *Mendenhall,* —— U.S. ——, 100 S. Ct. 1870 (1980); *Davis* v. *Mississippi,* 394 U.S. 721 (1969); *Terry* v. *Ohio,* 392 U.S. 1 (1968).

Apparently the majority opinion equates flight from police inquiry with refusal to answer police interrogation. Petitioner can find no authority in this Court's decisions or the New York Court of Appeals' own decsions for this equation. Judge Meyer appears to have had the same problem, as his opinion notes that there are "surprisingly few cases" in this area and that, "[n]o New York appellate

opinion has dealt with the subject other than as it is touched upon inferentially in general discussion of the right to remain silent . . . ." 50 N.Y.2d at 590-91. At the same time, the majority opinion disregarded numerous appellate decisions emphasizing the value of flight as a factor determining probable cause. *See, e.g., Sibron* v. *New York, supra; People* v. *Kreichman,* 37 N.Y.2d 693, 699 (1975); *People* v. *Schneider,* 58 A.D.2d 817, 818 (2d Dept. 1977); *People* v. *Dread,* 49 A.D.2d 401, 405 (1st Dept. 1975); *People* v. *Holdman,* 383 N.E.2d 155, 158 (Ill. 1978).

Not only is the majority opinion below without precedential support, illogical, and unduly burdensome on the police, it may actually be dangerous. It sanctions flight by suspects from the exercise of reasoned authority. Such suspects may, as was the case here, be armed and potentially dangerous. It should not be difficult to envision additional perils to innocent bystanders on the street if more individuals flee from police authority rather than deal face to face with police officers seeking to inquire. Implicit in the majority holding is that a suspect may have nothing to lose and everything to gain by running away from a police officer who approaches.

The Abandonment Issue

According to the majority opinion, whether there is an abandonment is "essentially a question of constitutional law." 50 N.Y.2d at 593. It allegedly applied the constitutional standard enunciated by this Court in *Brookhart* v. *Janis,* 384 U.S. 1, 4 (1966) and *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938)—that the People must show "an intentional relinquishment or abandonment of a known right or

privilege''—to the facts of this case. *Id.* Yet, incredibly, the majority opinion concluded that a vanity case tossed amidst a pile of old furniture and junk in a basement by a defendant in flight who is apprehended on the opposite side of the room attempting to get out through a door and a window is not an abandonment. Indeed, the majority opinion overruled a unanimous ruling of the Appellate Division that there had been an abandonment. 65 A.D.2d 714 (1st Dept. 1978).

If the Court of Appeals' ruling on this issue is permitted to stand, therefore, it will be infinitely more difficult for the police to respond intelligently to the common, everyday types of on-the-street situations this case represents. The ruling in this case will make it difficult, if not impossible, to establish that property tossed away by defendants seeking to avoid apprehension has been abandoned and is, therefore, seizable by the police.

Moreover, the dissenting opinion in the Court of Appeals noted, ''this is not the typical case where the theory of abandonment is utilized to explain the dissipation of taint flowing from illegal police activity. Instead, the record reveals that this is a case where defendant attempted to divest himself of the drugs and gun so that no incriminating evidence could be discovered by the police who were rightfully in pursuit.'' 50 N.Y.2d at 595.

Thus, significant questions are presented by the majority opinion's ruling on the abandonment issue as well as on the question of the legality of the police pursuit. If the four-judge, majority opinion is allowed to stand, the Federal Constitution will now preclude police officers in

New York (and perhaps other jurisdictions which will follow this decision) from pursuing suspects who flee from inquiry, which is unquestionably legitimate and reasonable. Of the twelve New York appellate judges who have reviewed these issues, eight decided them in favor of the People. The four-judge, majority opinion of the New York Court of Appeals will, of course, stand nevertheless, unless this Court agrees to review the significant constitutional questions presented by this novel and ill-advised decision.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New York Court of Appeals.

Respectfully submitted,

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September 1980

Appendices

APPENDIX A

Judgment and Opinion of New York Court of Appeals

STATE OF NEW YORK—COURT OF APPEALS

1 No. 362

THE PEOPLE, &c.,

Respondent,

vs.

ARCHIE W. HOWARD,

Appellant.

(362) Henry Winestine & William E. Hellerstein, N.Y. Legal Aid, for appellant.

Mario Merola, DA, Bronx County (Cary W. Sucoff & Timothy J. McGinn of counsel) for respondent.

MEYER, J.

An individual to whom a police officer addresses a question has a constitutional right not to respond. He may remain silent or walk or run away. His refusal to answer is not a crime. Though the police officer may endeavor to complete the interrogation, he may not pursue, absent probable cause to believe that the individual has committed, is committing, or is about to commit a crime, seize or

search the individual or his possessions, even though he ran away. Nor when the individual, cornered by his pursuers in the basement of a building and while looking for a way out of the basement, drops or throws a package he was carrying into a pile of junk, has he been shown to have intentionally abandoned the package so as to make a warrantless search and seizure permissible. The order of the Appellate Division should, therefore, be reversed, the motion to suppress should be granted and the indictment should be dismissed.

Indicted for criminal possession of a controlled substance in the first degree and criminal possession of a weapon in the third degree, defendant Howard moved to suppress the gun and drugs which formed the basis for the indictment. They had been taken from him by Officers Charles Hanley and Cornelius Brosnan, who on the day of the seizure were on anti-crime patrol in the Bronx in plainclothes and in an unmarked automobile. At about 1 p.m., in broad daylight, on University Avenue in the vicinity of Father Zeiser Place (an area which had a high incidence of burglaries), the officers observed Howard crossing University Avenue diagonally in a southeasterly direction. Their curiosity was aroused by the fact that defendant was carrying what appeared to be a woman's vanity case. As they passed defendant, both officers saw him look over his shoulder in their direction, in a manner described by Officer Hanley as "furtive". Defendant looked in the direction of the car two or three more times until he reached the center of University Avenue. Then as Hanley pulled the car to the right side of the street, defendant reversed direction, walked to the west side of the street and proceeded south on the sidewalk.

The police car made a U-turn and once again the officers saw defendant look in their direction. As the car neared him, defendant's pace quickened. As the car came parallel with defendant, Officer Brosnan displayed his police shield and said "Police Officer. I would like to speak to you." Though looking directly at the officers, defendant ignored them and continued walking south. The police followed and at the next opening between parked cars, Brosnan repeated the same words, and began to get out of the car. Defendant, without saying anything, started to run, holding the vanity case to his chest like a football would be held. The officers pursued and were joined in the chase by Victor Dragaj, a college freshman. Defendant proceeded over an iron fence, through an alleyway and into the basement of a building, at which point, pursued by Dragaj, defendant threw the vanity case into a pile of junk in the corner and sought but was unable to escape through a door which was locked, or a small window on the far side of the room. Dragaj restrained defendant and was joined by Officer Brosnan, who asked defendant why he had tried to get away. About 25 seconds later they were joined by Officer Hanley, who identified himself as a policeman and asked about the vanity case or box. Dragaj pointed to it and Hanley retrieved it from the rubbish pile, which was beyond defendant's reach, and immediately opened it, revealing a .38 caliber revolver and heroin in glassine envelopes. Hanley then placed defendant under formal arrest.

Criminal Term granted defendant's motion to suppress, concluding that defendant's flight could not escalate suspicion to anything more, that even if defendant's flight made a stop and frisk permissible the officers went beyond

the allowable scope of Section 140.50 of the Criminal Procedure Law since defendant was no threat to the officers' safety and the vanity case was outside the grabbable area, and that there had been no abandonment. The Appellate Division reversed on both grounds, "on the law and the facts" (65 AD2d 714). Since reversal was not on the law alone defendant's application for permission to appeal was dismissed (46 NY2d 1080). Howard then pleaded guilty to criminal possession of a controlled substance and appealed as permitted by subdivision (2) of Section 710.70 of the Criminal Procedure Law. The Appellate Division having affirmed without opinion (72 AD2d 503), leave to appeal was granted by a judge of this court (48 NY2d 801).

Defendant argues that there was no justification for police action of any kind; that in any event he had a constitutional right to refuse to answer a police inquiry; that his exercise of that right by walking and then running away did not justify detention of him or seizure of the vanity case; and that as a matter of law there was no abandonment. While we hold that there was a sufficient basis to permit inquiry, we agree that defendant had the right not to answer, that his running did not, absent any indication that any crime had been or was about to be committed, permit detention; that there was no probable cause for defendant's arrest; and that the vanity case had not been abandoned.

As we have recently had reason to reiterate in *People* v *Belton* (50 NY2d —— [decided June 5, 1980]), "[t]he privacy interest of our citizens is far too cherished a right to be entrusted to the discretion of the officer in the field." That privacy interest is protected by the mandate of the Fourth Amendment to the United States Constitution and

Section 12 of Article I of our state Constitution both of which, in identical language, state: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." It is protected as well by Section 140.50 of the Criminal Procedure Law, which outlines when a police officer may stop and search persons in a public place,[1] and by decisional law expounding the common law and interpreting the constitutional and statutory safeguards.

The principles that have evolved seek to balance society's interest in the detection and prevention of crime and in the protection of the lives and safety of law enforcement officers with the interest of individuals in living their lives free from governmental interference. Therefore, whether there has been an unreasonable breach of legitimate expectations of privacy involves consideration of (1) the nature and scope or severity of the interference with individual

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1. Subdivisions 1 and 3 of CPL §140.50 read, in pertinent part:

> "1. . . . [A] police officer may stop a person in a public place . . . when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor . . . and may demand of him his name, address and an explanation of his conduct.
>
> * * *
>
> "3. When upon stopping a person under circumstances prescribed in [subdivision] one . . . a police officer . . . reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall return it, if lawfully possessed, or arrest such person."

liberty, (2) the public interest served, and (3) the objective facts upon which the enforcement officer relied, in light of his knowledge and experience (see *United States* v *Mendenhall*, —— US ——, USLW 4575, 4580 [Powell, J., concurring]; see also *Brown* v *Texas*, 443 US 47, 50-51; *Dunaway* v *New York*, 442 US 200, 211-214; *Delaware* v *Prouse*, 440 US 648, 654-655; *Terry* v *Ohio*, 392 US 1, 20-22; which it is argued affect the classifications we enunciated in *People* v *De Bour*, 40 NY2d 210).

We have no difficulty in concluding that the officers' request for information from defendant was justified under those criteria. In an area beset by a high burglary rate defendant was seen carrying a woman's vanity case by the officers, one of whom testified that it was not uncommon for a burglar to carry away loot in his victim's luggage. Considering those facts together with defendant's numerous glances at the officers' car, his change of direction and his quickened pace, we conclude that, though the carrying by a man of a woman's purse does not constitute probable cause (*People* v *Davis*, 36 NY2d 280, cert den 423 US 876) and though defendant could, the car being unmarked and the officers in plainclothes, have acted evasively out of fear for his own safety, the circumstances constituted a sufficient basis[2] for the inquiry made, which of itself constituted no more than a minor inconvenience to defendant (*David* v *Mississippi*, 394 US 721, 727, n 6, and cases cited *infra*, pp 7 and 8; see 3 La Fave, Search & Seizure, par 9.2).

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2. While Officer Brosnan conceded that he was "curious as to what was in the bag," his inquiry cannot be said to have resulted from "mere whim, caprice or idle curiosity" (*People* v *De Bour*, 40 NY2d at p 217, *supra*) in light of the other circumstances, nor is there any indication that it was "undertaken with the intent to harass" (*id*).

There was, therefore, basis for questioning defendant, but there was nothing that made permissible any greater level of intrusion. The officers had no information that a crime had occurred or was about to take place, had not seen defendant do anything criminal, and were confronted only by facts susceptible of innocent interpretation (*State* v *Saia,* 302 So2d 869 [La], cert den 420 US 869). Presence in an area of "frequent burglaries" was an insufficient basis (*People* v *Schanbarger,* 24 NY2d 288, 291); in this day of unisex haircuts and clothing, the carrying of a woman's vanity case was at best equivocal (*People* v *Davis,* 36 NY2d 280, cert den 423 US 876; cf. *People* v *Larkin,* 21 AD2d 902, *supra*); and defendant's "furtive" movements (repeated glances, change of direction, quickened pace) were, the car being unmarked and the officers not in uniform as already noted, at best ambiguous (cf. *People* v *Batista,* 68 AD2d 515, 517; *People* v *Towers,* 49 AD2d 839; see Annotation: Search & Seizure: Furtive Movement or Gesture as Justifying Police Search, 45 ALR3d 581, 600 ff). The circumstances justified the inquiry made and would have justified the officers in keeping defendant under observation (*People* v *Sobotker,* 43 NY 559, 564) but were not a predicate for anything more (cf. *Dunaway* v *New York,* 442 US 200, 211-214; *Sibron* v *New York,* 392 US 40, 64).

But while the police had the right to make the inquiry, defendant had a constitutional right not to respond. This is so both because the Fifth Amendment to the United States Constitution and its state counterpart (New York Const, Art 1, Sec 6) permitted him to remain silent and because the Fourth Amendment and its Article 1, Section 12 state counterpart protect him from detention amounting

to seizure unless there is probable cause. As Mr. Justice Brandeis put it long age in *Olmstead* v *United States* (277 US 438, 478), defendant had "the right to be let alone."

There are surprisingly few cases explicitly so holding, probably because few individuals feel they can walk away or refuse to answer (see *Illinois Migrant Council* v *Pilliod,* 398 F Supp 882, 899, affd 540 F2d 1062, on reh 548 F2d 715; A.L.I. Model Code of Pre-Arraignment Procedure [1975], p 257). No New York appellate opinion has dealt with the subject other than as it is touched upon inferentially in general discussion of the right to remain silent (e.g., *People* v *Conyers,* 49 NY2d 174), but it has been passed upon at Criminal Term and in out-of-state cases and legal commentaries. Thus, *People* v *Burns* (91 Misc 2d 1080, 1086 [Goldfluss, J.]) held that "What sets this Nation apart from others is that its system of criminal prosecution is accusatorial, not inquisitorial. A citizen may, if he so chooses, exercise the right to demand that the police secure evidence of his guilt from other sources than from out of his own mouth," and in *People* v *De Fillippo* (80 Mich App. 197, 202, reversed on other grounds *sub nom De Fillippo* v *Michigan,* 443 US 31) the Michigan Court of Appeals held that "While police may under certain circumstances intrude upon a person's privacy by stopping him and asking questions (*Terry* v *Ohio,* 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 [1968]), there can be no requirement that the person answer." In support of that holding the Michigan court cited the reference in *Davis* v *Mississippi* (394 US 721, 727, fn 6) to "the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." Supporting authority

is to be found in cases defining "seizure" by whether the individual interrogated had lost his "equal right to ignore his interrogator and walk away" (*Terry* v *Ohio,* 392 US 1, 33 [Harlan, J., concurring], see also 392 US at p 16 [majority opinion], 392 US at p 34 [White, J., concurring]; accord: *United States* v *Mendenhall,* —— US ——, 48 USLW 4575, 4578 [Stewart, J. in an opinion in which Rehnquist, J. joined and with which Burger, C.J., Powell and Blackmun, JJ. did "not necessarily disagree"]). Other cases and authorities conceptually in accord with our holding are *United States* v *Price* (599 F2d 494); *United States* v *Wylie* (569 F2d 62, cer den 435 US 944); *Commonwealth* v *Ellis* (223 Pa Super 1969); *State* v *Tsukiyama* (56 Haw 8); *State* v *Evans* (16 Ore App 189); *People* v *Ortiz* (18 Ill App 3d 431); Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like (3 Crim Law Bull 205, 228).

Nor can the failure to stop or cooperate by identifying oneself or answering questions be the predicate for an arrest absent other circumstances constituting probable cause (*People* v *Samuels,* 50 NY2d —— [decided herewith]; *People* v *Berck,* 32 NY2d 567, 574, cert den 414 US 1093; *Brown* v *Texas,* 443 US 47; A.L.I. Model Code of Pre-Arraignment Procedure [1975], p 300; but see 1 La Fave, Search & Seizure 673-675, §3.6[f]). This is because the failure to answer "cannot constitute a criminal act" (*People* v *Schanbarger,* 24 NY2d 288, 292).

That does not mean that the police in furtherance of their duties may not continue observation provided that they do so unobtrusively and do not limit defendant's freedom of movement by so doing. Defendant's flight, had

there also been indicia of criminal activity, would have been an important factor in determining probable cause (*Sibron* v *New York,* 392 US 40, 66, 67; *People* v *Kreichman,* 37 NY2d 693, 699; *People* v *Dread,* 49 AD2d 401, affd 41 NY2d 871; *People* v *Schneider,* 58 AD2d 817, 818), but where, as here, there is nothing to establish that a crime has been or is being committed, flight, like refusal to answer, is an insufficient basis for seizure or for the limited detention that is involved in pursuit (*Brown* v *Texas,* 443 US 47, 50; *Sibron* v *New York, supra; Wong Sun* v *United States,* 371 US 471; *People* v *Kreichman,* 37 NY2d at p 699, *supra; State* v *Finklea,* 313 So2d 224 [La]; 1 La Fave, Search & Seizure 669, §3.6[e]; A.L.I. Model Code, *supra* 298 ["The factors of flight and concealment are also attenuated to the point where they will not alone justify an arrest in cases where there is little or no probability that a crime has been committed"]). The circumstances existing at the moment defendant Howard was seized by Officer Brosnan did not constitute probable cause for arrest. The opening of the vanity case cannot be justified as incident to a lawful arrest, nor since it was as the Trial Judge found outside the grabbable area can it be justified under subdivision 3 of Section 140.50 of the Criminal Procedure Law. The contents of the vanity case must, therefore, be suppressed unless defendant abandoned it.

Property which has in fact been abandoned is outside the protection of the constitutional provisions (*People* v *Pittman,* 14 NY2d 885; *People* v *Lopez,* 22 AD2d 813; *People* v *Prisco,* 61 Misc2d 730). We do not find it necessary to consider whether the facts of this case bring it within the concept of police action short of illegal seizure but sufficiently coercive to nullify an abandonment for

Fourth Amendment purposes (see 1 La Fave, Search & Seizure 372-374, §2.6[b]; cf. *Commonwealth* v *Barnett,* 484 Pa 211), for we agree with the hearing judge that intent to abandon cannot be found on the facts of this case.

Whether there was an abandonment is partly a matter of property law but essentially a question of constitutional law. There is a presumption aganist the waiver of constitutional rights. It is the People's burden to overcome that presumption by evidence of "an intentional relinquishment or abandonment of a known right or privilege" (*Brookhart* v *Janis,* 384 US 1, 4; *Johnson* v *Zerbst,* 304 US 458, 464; *People* v *Whitehurst,* 25 NY2d 389, 391). The proof supporting abandonment should "reasonably beget the exclusive inference of the throwing away" (*Foulke* v *New York Consolid. R.R.,* 228 NY 269, 273, quoted with approval in *United States* v *Cowan,* 396 F2d 83, 87). So concealment in a trash can does not constitute an abandonment (*Work* v *United States,* 243 F2d 660, 662; *State* v *Chapman,* 250 AD2d 203, 212 [Maine]).

As the hearing judge noted, the act of defendant in holding on to the case during the entire chase belies intention to abandon. Since Dragaj and the police were in hot pursuit, it cannot be found that defendant's act in dropping or throwing the case in the corner while seeking to open or break down the door and window in the basement was an act "involving a calculated risk" rather than a spontaneous reaction to the necessity of evading his pursuers (see *People* v *Boodle,* 47 NY2d 398, 404, cert den —— US ——) or that he purposefully divested himself of possession of the vanity case.[3] Under those circumstances he cannot

3. Cf. *Walter* v *United States* (—— US ——, n 11, 48 USLW 4807, 4810, n 11).

be said to have knowingly waived his constitutional protection against warrantless search of the case.

For the foregoing reasons, the order of the Appellate Division should be reversed, the motion to suppress should be dismissed (see *Matter of Forte* v *Supreme Court of the State of New York,* 48 NY2d 179).

JASEN, J. (dissenting):

Certannly, I have no quarrel with two of the conclusions reached by the majority, to wit: that there existed a sufficient basis for the police officers to approach defendant in order to ask questions (see *People* v *DeBour,* 40 NY2d 210); and that an individual has the absolute right to refuse to answer inquiries posed to him by law enforcement officers (see *People* v *Rogers,* 48 NY2d 167, 176 [dissenting op]). However, I simply cannot agree with the majority's holding that the police officers could not pursue defendant. Given the particular facts of this case, the officers were completely justified in both chasing and seizing defendant, and searching the vanity case. A contrary conclusion serves merely to deal another serious and unjustifiable blow to effective law enforcement.

This is another in a vast line of cases where the defendant asserts as his sole ground for reversal that the actions of the police officers violated his constitutionally guaranteed right to be free from unreasonable searches and seizures. (U S Const, 4th Amdt; N Y Const, art I, § 12.) While this observation surely does not relieve the courts of their responsibility of overturning a criminal conviction when a valid constitutional claim is asserted no matter how unpleasant the thought that a criminal will "go free because the constable has blundered" (*People* v *DeFore,* 242 NY 13,

21 [Cardozo Ch. J.]), courts should not blindly reach out and find merit in a constitutional claim where none exists. It seems odd that an admittedly guilty person should be set free, especially where, as here, the police officers acted in a most reasonable manner.

As the majority candidly concedes, the police officers were justified in approaching defendant to request information. Defendant was observed in a high-crime area carrying a woman's vanity case, an item of luggage often times used by a burglar when absconding with his bounty. Further, defendant cast numerous glances at the police officers when they passed him on University Avenue. As Officer Hanley pulled the car to the side of the road, defendant then changed direction to return to the far side of the street. Once the officers made a U-turn to approach defendant, his pace quickened in an obvious attempt to avoid confrontation.

Seeing these highly suspicious acts, the officers were absolutely justified in pulling their car alongside defendant and, after displaying a shield, requesting defendant to speak to them. In addition, the officers acted reasonably in following defendant a short distance to repeat their request. Certainly, the officers could have believed that defendant merely could not hear them when they first approached, due to traffic noise or the like.

Then, as Officer Brosnan began to get out of the car, defendant ran away, clutching the vanity case to his breast. The officers had yet to ask defendant a single question as to his activities, and certainly did not physically intimidate defendant. No guns were drawn no coercive language was employed, and no binding orders were transmitted.

Yet, faced with these facts of an incriminating nature, the majority today holds that the officers could do no more than follow defendant to observe him from a distance. Such a conclusion borders on the absurd. The officers had every right, if not the obligation, to pursue defendant in order to investigate this highly suspicious conduct. In my opinion, once defendant ran away, the officers' level of suspicion was elevated to one of probable cause, remembering that "[p]robable cause exists if the facts and circumstances known to the arresting officer warrant a prudent man in believing that [an] offense has been committed" by the person to be arrested. (*People* v *Oden,* 36 NY2d 382, 384; *Brinegar* v *United States,* 338 US 160, 175-176.)

It is true that flight from police, in and of itself, would not constitute a sufficient basis for arrest. However, it is equally as true that defendant's flight is an important factor to be considered when determining whether probable cause existed. (See, e.g., *Sibron* v *New York,* 392 US 40, 66-67; *People* v *Kreichman,* 37 NY2d 693, 699; *People* v *Schneider,* 58 AD2d 817, 818; *People* v *Dread,* 49 AD2d 401, 405; *People* v *Archiopoli,* 39 AD2d 748). Here, defendant's flight certainly bolstered and confirmed the officers' suspicion—based upon their prior observations—that defendant was engaging in criminal activity. Thus, the officers had probable cause to arrest defendant, and the arrest was entirely proper.

Nor can I accept the majority's holding that defendant did not evince an intent to abandon the vanity case. I would agree completely with the unanimous Appellate Division that under the circumstances present here "there was an abandonment of the bag." (65 AD2d, at p 714.)

As the above-stated analysis demonstrates, the action of the police officers in seizing defendant were totally rea-

sonable and beyond reproach. Thus, this is not the typical case where the theory of abandonment is utilized to explain the dissipation of taint flowing from illegal activity. (E.g., *People* v *Boodle,* 47 NY2d 398, cert den 100 S Ct 461; *People* v *Townes,* 41 NY2d 97.) Instead, the record reveals that this is a case where defendant attempted to divest himself of the drugs and gun so that no incriminating evidence could be discovered by the police who were rightfully in pursuit.

When "[t]he actions of defendant indicate an intent to purposefully divest himself of possession of the [property]", an abandonment will be said to have occurred. (*People* v *Brown,* 40 AD2d 527, 528.) Here, there can be no doubt but that defendant, by throwing the vanity case on the pile of junk in the corner of the basement, intended to rid himself of the case containing incriminating evidence. He obviously did not harbor an expectation of retrieving the case, nor is there any evidence that he threw the case in the corner after the police arrived. Rather, defendant attempted to divest himself forever of the damning evidence before the law enforcement officers appeared. For this reason, the warrantless search of the vanity case was proper, inasmuch as defendant abandoned the case, thus relinquishing his privacy interest therein.

Accordingly, since the seizure of defendant and the search of the vanity case were eminently proper, I would affirm the order of the Appellate Division.

* * *

Order reversed, motion to suppress granted and indictment dismissed. Opinion by Meyer, J. All concur except Jasen, J., who dissents and votes to affirm in an opinion in which Gabrielli and Wachtler, JJ., concur.

Decided July 3, 1980

APPENDIX B

Judgment and Opinion of Appellate Division, First Department

(October 4, 1979)

Order of the Appellate Division Appealed From

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on 4th day of October, 1979

Present—Hon. Arnold L. Fein, Justice Presiding
Joseph P. Sullivan
Myles J. Lane
Vincent A. Lupiano
J. Robert Lynch Justices

Order of Affirmance on Appeal from Judgment

6098

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

ARCHIE WILLIAM HOWARD,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Cohen, J.), rendered on January 2, 1979 (Cohen, J., at plea and sentence; Lowe, J., at suppression), convicting defendant of criminal possession of a controlled substance in the third degree, and said appeal having been argued by Mr. Henry Winestine of counsel

for the appellant, and by Mr. Cary W. Sucoff of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed, without prejudice to a renewed application to reduce sentence before the sentencing court. See Penal Law, § 60.09, effective September 1, 1979.

ENTER:

Joseph J. Lucchi
Clerk.

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

APPENDIX C

Judgment and Opinion of Appellate Division, First Department

(November 16, 1978)

Order of the Appellate Division on the Prior Appeal

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 16, 1978

Present—Hon. Theodore R. Kupferman, Justice Presiding
Harold Birns
Arnold L. Fein
Arthur Markewich
Leonard H. Sandler, Justices

3489

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

ARCHIE WILLIAM HOWARD a/k/a WILLIAM ARCHIE HOWARD,

Defendant-Respondent.

An appeal having been taken to this Court by the appellant from the order of the Supreme Court, Bronx County (Lowe, J.), entered on June 5, 1978, granting defendant's motion to suppress physical evidence pursuant to CPL 710.20, and said appeal having been argued by Mr. Alan D. Marrus of counsel for the appellant, and by Mr. Henry Winestine of counsel for the respondent; and due delibera-

tion having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby reversed, on the law and the facts, and the motion to suppress denied, and the matter remanded for further proceedings. Findings of fact inconsistent herewith are reversed.

ENTER:

Joseph J. Lucchi
Clerk.

Opinion of the Appellate Division on the Prior Appeal

Kupferman, J.P., Birns, Fein, Markewich, Sandler, JJ.

3489

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant, A.D. Marrus

against

ARCHIE WILLIAM HOWARD a/k/a WILLIAM ARCHIE HOWARD,

Defendant-Respondent. H. Winestine

Order, Supreme Court, Bronx County (Lowe, J.) entered June 5, 1978, granting the defendant-respondent's motion to suppress physical evidence pursuant to CPL Sec. 710.20, unanimously reversed on the law and the facts, and the motion to suppress denied; and the matter remanded for further proceedings. Findings of fact inconsistent herewith are reversed.

Two police officers in plainclothes and in an unmarked car in a high crime area observed the defendant carrying a small piece of luggage variously described as a woman's vanity case or a square lunch box. Because he looked suspicious, one of the officers came abreast of him, displayed his police shield and said "police officer, I would

like to speak to you''. The defendant ignored the police, and when they repeated the statement, the defendant began to run and climbed an iron fence, with one of the police officers in pursuit. A civilian also joined the chase and followed the defendant into a basement where he saw him throw the bag into a corner among some old furniture. The defendant then ran to the opposite wall and tried to escape through a small window. The civilian held him until the police arrived. The officer could not find the bag, but the civilian pointed to it, and when the officer opened it, he discovered a large amount of heroin in glassine envelopes and a revolver.

The officers' actions were proper throughout the entire incident, and the motion to suppress should have been denied. Under the circumstances heretofore disclosed, the police were entitled to pursue the defendant. *People* v. *Rosemond,* 26 N. Y. 2d 101; *People* v. *Archiopoli,* 39 A. D. 2d 748. Further, there was an abandonment of the bag. *People* v. *Brown,* 40 A. D. 2d 527.

Order filed.

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No. 80-~~453~~ 543

IN THE

SUPREME COURT OF THE UNITED STATES

1980 TERM

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STATE OF NEW YORK,

Petitioner,

v.

ARCHIE WILLIAM HOWARD,

Respondent.

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Archie William Howard, respondent herein, respectfully applies for leave to proceed in forma pauperis in this proceeding for a writ of certiorari to the New York Court of Appeals, and requests that the undersigned be assigned to represent him in this Court.

Dated: New York, New York
October 24, 1980

Respectfully submitted,

HENRY WINESTINE
WILLIAM E. HELLERSTEIN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
(212) 577-3420
Attorneys for Respondent

No. 80-453

IN THE

SUPREME COURT OF THE UNITED STATES

1980 TERM

STATE OF NEW YORK,

Petitioner,

v.

ARCHIE WILLIAM HOWARD,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Henry Winestine, being duly sworn, deposes and says:

1. I am an attorney on the staff of The Legal Aid Society, and represented respondent Archie William Howard on his appeals in the New York courts from his conviction on January 2, 1979. I submit this affidavit in support of his application to proceed in forma pauperis as respondent in this proceeding for a writ of certiorari.

2. Mr. Howard was represented by The Legal Aid Society in the trial court, as well as on his appeals. He was incarcerated from the date of his conviction until July 11, 1980, when he was released by virtue of the reversal of his conviction by the New York Court of Appeals.

3. I am advised by Mr. Howard that he did not obtain employment until September 26, 1980, when he began working for the D & D grocery store, 142nd Street at Lenox

Avenue in New York City. His employment is only for weekends and he receives only $2.50 per hour

3. Mr. Howard also advised me that he has not received any other income within the past twelve months from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources, and that he has no cash or bank accounts, or other valuable property. No one is dependent upon him for support.

Henry Winestine

Sworn to before me this
24th day of October, 1980

Myra K. Wallach

MYRA K. WALLACH
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-9512825
Qualified in Queens County
Term Expires March 30, 1982

CERTIFICATE OF SERVICE

Henry Winestine, a member of the bar of the Supreme Court of the United States, certifies that on October 24, 1980, a copy of the annexed Application to Proceed in Forma Pauperis was served by mail on Hon. Mario. Merola, District Attorney, Bronx County, at 215 East 161st Street, Bronx, New York 10451.

Dated: New York, New York
October 24, 1980

Henry Winestine

RECEIVED
OCT 27 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-543

IN THE

SUPREME COURT OF THE UNITED STATES

1980 TERM

STATE OF NEW YORK,

Petitioner,

v.

ARCHIE WILLIAM HOWARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

HENRY WINESTINE
WILLIAM E. HELLERSTEIN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
[212] 577-3420
Attorneys for Respondent

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No. 80-543

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF NEW YORK,

Petetioner,

v.

ARCHIE WILLIAM HOWARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Should the petition, filed four weeks out of time, be considered by the Court?

2. Is review by this Court barred where the decision of the state court is based upon adequate and independent state grounds?

3. May a police officer lacking reasonable suspicion that a crime has been commited, seize a citizen who has walked away from an inquiry and then flees when the officer attempts to physically stop him?

4. Should this Court review a factual determination by a state court that a suspect did not intend to abandon property, and if review is warranted is the state's conclusion correct as a matter of fact or on the alternative ground that there can be no abandonment when property is discarded during an illegal seizure?

STATEMENT OF THE CASE

Respondent adopts petitioner's statement of the case, but adds one additional fact:

Officer Brosnan testified that as he emerged from his police car after respondent had already walked away from the first inquiry, he intended to stop Howard, using physical force if necessary.

REASONS FOR DENYING THE WRIT

A. The petition is untimely

The judgment of the New York Court of Appeals was entered July 3, 1980. The petition for certiorari was due, under new Rule 20.1, on September 2, 1980. The petition was not filed until October 1, 1980, four weeks out of time. Petitioner, without seeking an extension of time pursuant to Rule 29, asserts unawareness of the new Rules and asks the Court to accept the petition.

Rule 20.1 provides that an extension of time for filing a petition for certiorari shall be granted "for good cause." Not only has petitioner failed to make proper application for an extension (presumably because such an application must be made within the period sought to be extended) but has failed to show good cause.

Lack of awareness of the new Rules is not an excuse. They were adopted April 14, 1980, with widespread publicity. They were promptly published in at least the following widely-read sources:

48 United States Law Week 4339 (April 15, 1980)

63 Lawyers Edition 2d Series, Advance Sheet No. 4 (May 15, 1980)

85 Federal Rules Decisions 435, Advance Sheet No. 2 (May 1980)

28 United States Code Annotated, volume containing Rules of the Supreme Court, pocket part distributed April 1980

12 Moore's Federal Practice

The New York Law Journal* of April 15, 1980, contained a front-page article concerning the new Rules. It expressly referred to the shortened time in which a petition may be filed to review a state court criminal case.

It is perhaps reasonable to excuse late filing by a pro se criminal defendant or a practitioner without ready access to an adequate library. It is another thing altogether for the Appeals Bureau of one of the nation's major prosecutor's offices to seek to avoid time restraints because of ignorance.

Petitioner urges that the untimely petition be considered because of the "seriousness of the issues" (petition at 2) and the "burdensome" and "dangerous" effect of the decision on law enforcement (petition at 11, 12-13). Respondent disputes those characterizations, but if they prove to be well-founded, other appropriate cases will certainly arise in which this Court can consider the issues.

B. The decision of the New York Court of Appeals rests on adequate state grounds.

It is clear that the New York Court of Appeals assumed that the search and seizure clause of Article 1, Section 12 of the New York Constitution and the Fourth Amendment to the United States Constitution are congruent as far as this case is concerned. Repeated references are made to both. But it is apparent from the multitude of New York cases relied upon and the numerous citations to the state constitution that state law as well as federal is being expounded, and that the court's decision was based as much on the state constitution as the federal. New York is free to adopt stricter constitutional standards than those contained in the

* The New York Law Journal is a daily newspaper which is the official publisher of calendars and decisions of the state and federal courts in New York City.

United States Constitution and has expressly done so in the past. E.g., People v. Elwell, 50 N.Y.2d 231, 235 (May 6, 1980); People v. Isaacson, 44 N.Y.2d 511, 519-520 (1978); People v. Hobson, 39 N.Y.2d 479, 483-484 (1976). Moreover, the New York court also grounded its decision on the state's "stop and frisk" statute, New York Criminal Procedure Law §140.50, (appendix to the petition 4a-5a), which does not implicate the United States Constitution in any respect in the context of this case.

This Court "will not review judgments of state courts that rest on adequate and independent state grounds." Herb v. Pitcairn, 324 U.S. 117, 125 (1945). And where a state court decision is based "on both state and federal grounds, either of which would have been dispositive," review is similarly barred. Zacchini v. Scripps-Howard Broadcasting Co. 433 U.S. 562, 568 (1977).

C. No issues in this case merit review

Respondent's flight

The petition misstates the issue decided by the New York court as dealing with a suspect who flees after an attempt by the police "to lawfully stop" him (petition at 9) and "flight by suspects from the exercise of reasoned authority" (petition at 11). Those statements beg the question by assuming that a stop was proper in the circumstances. The real issue was whether the initial attempt to stop was lawful.

Petitioner fails to consider the facts leading to respondent's flight: the officers, having no information which justified more than a mere inquiry, sought to question respondent, but he "look[ed] directly at the officers, . . . ignored them and continued walking" (as stated by the New York Court of Appeals, appendix to the petition 3a). It was only after respondent walked away that the officers repeated

their request as one of them emerged from the police car to stop him, precipitating respondent's flight.*

Petitioner does not argue that the officers, prior to the flight, possessed the reasonable suspicion which would have justified physically stopping Howard. Such a stop would have been a "seizure", defined by the majority in Terry v. Ohio, 392 U.S. 1, 16 (1968), as well as the concurrences, 392 U.S. at 32-33, 34, as interference with a citizen's "freedom to walk away." Having exercised his right to walk away, Howard's flight when the officer's persisted was certainly an appropriate response.

This view is supported by Reid v. Georgia, ___U.S.___, 48 U.S.L.W. 3847 (June 30, 1980), in which a Georgia court's judgment was reversed in a strikingly similar case. The per curiam opinion recites the alternative holding of the state court that probable cause to search existed after the defendant, stopped by officers, discarded his shoulder bag and fled, but the Court vacated the conviction without discussion of the suspect's flight.

Beyond the issue of the correctness of New York court's decision is the question whether this case warrants review. Contrary to petitioner's concern about the effect of the decision below on law enforcement, it will have few repercussions. As the New York court observed, "There are surprisingly few cases" dealing with cititzen's refusal to respond to police inquiry (appendix to petition 8a), and there is no reason to believe that a significant number of

* Although not mentioned in the opinion of the Court of Appeals Officer Brosnan testified at the hearing that his intent was to physically stop and question respondent. The fact of Howard's flight indicates that he was aware of the officer's intention. Whether this perception was based on street wisdom or a non-verbal communication from the officer is of no importance. An attempt to seize respondent occurred when Brosnan emerged from the car, before Howard took flight.

new cases will emerge. The impact of the case will be minimal, and hardly warrants review by this Court.

The abandonment issue

The court below found that under the circumstances established at the suppression hearing, respondent did not intend to abandon the case he was carrying. Although the court characterized the matter as "essentially a question of constitutional law" (appendix to petition 11a), it was determined as a factual issue. It therefore presents no question appropriate for certiorari. United States v. Johnston, 268 U.S. 220, 227 (1925). In deciding as it did, the New York court did not reach the alternative ground which had been argued and which respondent believes to be compelling: that where property is discarded in the course of an illegal detention, as a matter of law there can be no abandonment. Fletcher v. Wainwright, 399 F.2d 62, 64 (5th Cir. 1968); Massachusetts v. Painten, 368 F.2d 142, 144 (1st Cir. 1966), cert. dism. as improvidently granted, 389 U.S.560 (1968); People v. Baldwin, 25 N.Y.2d 66, 70 (1969).

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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No. 80-543

IN THE

Supreme Court of the United States

October Term, 1980

STATE OF NEW YORK,

Petitioner,

v.

ARCHIE WILLIAM HOWARD,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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Contrary to respondent's assertion, there is nothing in the New York Court of Appeals' decision which even suggests that it is adopting stricter constitutional standards for New York than those contained in the United States Constitution. The majority opinion emphasized that the Federal and State constitutional provisions involved contain "identical language" and placed great reliance upon this Court's decisions in *Brown* v. *Texas,* 443 U.S. 47, *Davis* v. *Mississippi,* 394 U.S. 721, and *Terry* v. *Ohio,* 392 U.S. 1. Indeed, this case is remarkably similar in its procedural posture to another Fourth Amendment case recently decided by this Court:

> This is one of those cases where 'at the very least, the (state) court felt compelled by what it understood to

> be federal constitutional considerations to construe . . . its own law in the manner it did.' *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S.Ct. 2849, 2853, 53 L.Ed.2d 965 (1977). Had state law not been mentioned at all, there would be no question about our jurisdiction, even though the state constitution might have provided an independent and adequate state ground. *Ibid.* The same result should follow here where the state constitutional holding depended upon the state court's view of the reach of the Fourth and Fourteenth Amendments. If the state court misapprehended federal law, 'it should be freed to decide . . . these according to its own local law.' *Southern R. Co.* these suits according to its own local law.' *Southern R. Co.* v. *Mayfield*, 340 U.S. 1, 5, 71 S.Ct. 1, 3, 95 L.Ed.3 (1950).

Delaware v. *Prouse*, 440 U.S. 648, ——, 99 S.Ct. 1391, 1356-6.

Respondent is similarly wrong in contending that the New York Court of Appeals "also grounded its decision on the state's 'stop and frisk' statute, New York Criminal Procedure Law § 140.50 . . . which does not implicate the United States Constitution in any respect in the context of this case." Brief for Respondent in Opposition, p. 4. This statutory section, *inter alia*, permits a police officer to stop a person in a public place upon a reasonable suspicion that the person has committed or is about to commit a crime and permits the officer to frisk the suspect if the officer reasonably suspects he is in danger of physical injury. Since the Court of Appeals specifically concluded that "[t]he officers had no information that a crime had occurred or was about to take place . . ." (Petitioner's Appendix, 7a), the instant case was not decided under this statute. In any event, moreover, it should be evident that this statute is a codification of this Court's Fourth Amendment ruling in *Terry* v. *Ohio, supra, Sibron* v. *New York* and *Peters* v. *New*

York, 392 U.S. 40. See Practice and Supplemental Practice Commentaries, McKinney's Consolidated Laws of New York, Criminal Procedure Law § 140.50.

Finally, this Court should be aware of the decision of the California Court of Appeals for the Fifth District in *People* v. *Allen,* 28 CrL 2037, decided August 29, 1980, in which the court ruled that a defendant's flight from a lawful investigatory stop by the police constituted an obstruction of justice. Thus, in California, people who flee from lawful investigative stops by the police are prosecuted for criminal conduct, whereas, in New York, police who chase after persons fleeing from lawful investigative stops are condemned for illegal activity. This egregious conflict in authority serves only to highlight the magnitude of the federal question presented.

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